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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Diana Owen Smith,
Plaintiff,
v.
Ohio Savings Bank, F.S.B.
Defendant.

NO. 2:05-cv-1236-LDG-RJJ

ORAL ARGUMENT REQUESTED

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff requests that Defendant's Motion for Summary Judgment be denied in all respects. Nowhere in its brief has Defendant either addressed the very specific, substantive reporting requirements of the FCRA or that its reporting is literally contrary to established industry standards. It has merely tied its amorphous position to Nevada's status as a community property state.

The issue underlying Plaintiff's motion practice is very narrow and straightforward. Plaintiff requests this Honorable court find that Defendant's wide-spread practice of annotating consumer credit profiles with bankruptcy notations notwithstanding that some consumers, including Ms. Smith, never declared bankruptcy

is inherently misleading. The Honorable Lloyd D. George, Senior United States District Court Judge, has previously found that this very type of reporting which fails to "adequately and sufficiently identify that the [underlying account is] included in the bankruptcy" of the party which actually filed the bankruptcy is inherently misleading, Spellman v. Experian Information Solutions, Inc., 2002 WL 799876 (Exhibit 1).[1]

Finally, Defendant has pointedly asserted that its reporting was at all times accurate. However, it has provided absolutely no explanation why it removed the disputed bankruptcy notation from Plaintiff's credit profiles just after this lawsuit was filed and served.

I.

MEMORANDUM OF POINTS AND AUTHORITIES

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.P. 56(c). The initial burden is on the moving party to show that there is an absence of genuine issues of material fact. *Celotex Corp. V. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). If the moving party meets its initial burden then the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed 2d 202 (1986). In deciding a motion for summary judgment, the court views the evidence of the non-movant in the light most favorable to that party, and all justifiable

[1] Counsel for Plaintiff represented Mr. Spellman.

inferences are also to be drawn in its favor. *Id.* At 255, 106 S.Ct. 2505.

II.

INTRODUCTION AND UNCONTROVERTED FACTS

As noted, this case is very straightforward. Plaintiff has never filed bankruptcy. Further, as Defendant quite openly expressed in its motion for summary judgment filed December 7, 2007, pages 2-4, Defendant responded to Plaintiff's various disputes, conveyed through the national credit reporting agencies, "by indicating that the bankruptcy notation was proper. . ." *Id.*, page 4, lines 17-18. Defendant premised this conclusion on the 2004 bankruptcy filing of *Plaintiff's spouse*. Thus, the only question raised is whether this practice is inaccurate in violation of the FCRA.

Congress enacted the FCRA in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (CCPA), the plenary regulation of the national consumer credit industry. Consumer credit has expanded over one hundred fold in the last fifty years and is now one of the largest sectors of the national economy. Growing from six billion dollars at the end of World War II, outstanding consumer credit debt rose to 116 billion dollars in 1970 when Congress enacted the FCRA and by 1993 reached over 700 billion dollars. S. Rep. 103-209, 103d Cong., 1st Sess. 2-3 (1993). To support this phenomenal level of activity, the consumer reporting industry maintains 450 million credit files on more than 110 million individuals, virtually the entire adult population of the country, and processes almost 2 billion pieces of data per month. *Id.*, at 3. In view of the demonstrated potential for error

in operating this informational maze, Congress adopted the FCRA with the explicit recognition that the health of the consumer banking system is "dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. § 1681(a)(1).

A recurring theme which is at the heart of the CCPA is that the dissemination of accurate credit information is essential to maintain the vitality of the credit granting system for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose that credit grantors be in the best position to make reliable credit granting decisions, the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, Title I of the CCPA (TILA), establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." 15 U.S.C. § 1601(a). In addition to the FCRA and TILA, Congress has included a further self-help checking mechanism within the CCPA as Title VII, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, providing yet another information sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action taken, such as credit denial. 15 U.S.C. § 1691d.

The Supreme Court succinctly stated this guiding principle of this congressional philosophy nearly thirty years ago in its initial and seminal teaching under the CCPA: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973). The 1996 amendments to

the FCRA were adopted with the recognition that credit decisions made in ignorance or without the benefit of accurate information, whether made by credit grantors or consumers, undermine the vitality of the consumer economy.

Unfortunately, despite the intent and best efforts of Congress in adopting the FCRA, accurate information was not being consistently provided by the consumer reporting system to its credit granting clientele. In the deliberations that culminated with enacting the 1996 amendments, Congress was presented with the staggering statistic that nearly half of all consumer reports (48%) maintained by the three major consumer reporting agencies contain inaccurate information. S. Rep. 103-209, *supra*, at 3. By 1996, Congress was poised to reform and strengthen the credit reporting system that it had left essentially untouched for twenty-five years. *Id.*, at 2.

In 2002 our Court of Appeals specifically ruled that the 1996 Amendments confer a private right of action for violations of FCRA § 1681s-2(b), *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057 (9th Cir. 2002).[2] In *Nelson* Circuit Judge Noonan provided a pointed synopsis (*Id.*, 1058) referencing Chase's virtually identical practice of reporting the bankruptcy of a consumer on the credit profile of a non-filer.[3]

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[2] Counsel for Plaintiff represented Mr. Nelson.

[3] It should be noted that Messrs. Spellman and Nelson were at least co-borrowers on the respective notes underlying their lawsuits. Here Plaintiff's spouse, James Smith, *only* filed bankruptcy and was not even a signatory to the note which underlies Plaintiff's claims.

III.

ARGUMENT

A. On January 13, 2005, Defendant denied Plaintiff credit due to the ostensible "bankruptcy" on her credit profile.

As alleged in the Complaint Plaintiff applied for additional financing with Defendant during January 2005. Defendant does not dispute this. On January 13, 2005, Defendant denied Plaintiff additional credit based upon the ostensible bankruptcy in her credit profile (Complaint, Exhibit 1). There is nothing which more dramatically exposes Defendant's inherently inaccurate reporting than the irony that Defendant itself denied Plaintiff credit due to its own misleading information. Exhibit 1 to the Complaint is, after all, *Defendant's own document*.

On January 10, 2002, the Honorable Lloyd D. George, Senior District Court Judge, rendered a decision on a virtually identical issue in *Spellman v. Experian Information Solutions, Inc.*, 2002 WL 799876 (Exhibit 1). As expressed in footnote 3, Mr. Spellman was at least a co-borrower on the underlying mortgage note. Here, Plaintiff's spouse filed bankruptcy and was not even a signatory on Plaintiff's account. Judge George specifically determined that this type of practice was misleading:

> "By failing to adequately and sufficiently identify that the mortgage was included in the bankruptcy of *only* the joint holder, Kathleen Spellman, and by failing to adequately and sufficiently identify that *only* the liability of the joint holder was discharged by bankruptcy, the report can mislead the reader to the inaccurate conclusion that Spellman included the mortgage in his bankruptcy (<u>and thereby inaccurately implying that he ***had declared bankruptcy***</u>) and that Spellman's

> liability on the mortgage was discharged. The ambiguous statement in the credit report that the unidentified "primary borrower" declared bankruptcy does not cure but amplifies the misleading nature of the report as it concerns Spellman's credit history regarding the mortgage."

Further, Defendant's own policies and procedures proscribe this precise conduct in accordance with the relevant industry standard. In response to Plaintiff's discovery requests Defendant produced its Policy and Procedures Manual. An excerpt from that Manual is provided as Exhibit 2. Exhibit 2 provides a very brief synopsis of Metro-2 formatting engendered by industry to establish uniform reporting standards. Exhibit 2 also provides the specific industry standard relating to the reporting of a bankruptcy on the credit report of a non-filer. Defendant's own Manual indicates under Frequently Asked Questions the consumer information indicators (CII) must be left blank on the credit report of a non-filer and that the CII is the "critical" piece of information. In other words, a furnisher of information is prohibited from reporting a bankruptcy notation on the credit profile of a consumer who has not filed bankruptcy.

As noted, Metro-2 software is used by industry to establish applicable uniform standards:

> Metro 2 is a reporting format used by furnishers to provide information about consumer accounts to consumer reporting agencies. The Metro format software has been around since the 1970s. Metro 2 is the version created after the 1996 amendments to the Fair Credit Reporting Act. It was designed by the credit reporting industry, including the so-called "Big Three": Equifax, Experian, and Trans Union. The program and instructions are available for users from the Associated Credit Bureaus, Inc., an industry trade association, and from each of the major reporting agencies. While Metro 2 is the current industry standard for furnishing consumer information to reporting agencies, some creditors may still be using an

earlier version. Fair Credit Reporting Act, 5th Edition, page 56, National Consumer Law Center, 2002.

Here Defendant has adopted on a widespread basis reporting practices prohibited by industry standards as exemplified by its very own Policy Manual.

B. Defendant has adopted a "technical accuracy" defense which has been discredited by the Courts.

Any mere technical accuracy of Defendant's reporting does not achieve FCRA compliance. The FCRA requires more than technical or literal accuracy; it requires "maximum possible accuracy of the information concerning the individual about whom the report relates." § 1681e(b). To ensure that reporting agencies meet this exacting standard, the FCRA authorizes a consumer to institute the dispute process as Plaintiff did here to challenge the "completeness or accuracy" of any reported item. § 1681i(a)(1)(A). Failing to identify that Plaintiff never declared bankruptcy, particularly when she is the consumer on whose report the entry appears, is quintessentially inadequate to satisfy the FCRA's standards.

The District of Columbia Circuit has condemned this type of incomplete and misleading entry:

> First of all, we do not agree with the district court that section 1681e(b) makes a credit reporting agency liable for damages only if the report contains statements that are technically untrue. Congress did not limit the Act's mandate to reasonable procedures to assure only technical accuracy; to the contrary, the Act required reasonable procedures to assure "maximum accuracy." The Act's self-stated purpose is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15

> U.S.C. 1681e(b). <u>Certainly reports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer who is the subject of the reports</u>.
>
> . . . .
>
> Applying that interpretation in this case, we find that the district court's dismissal of the Koropoulos' claims by summary judgment on the grounds that the information in the report was technically accurate, regardless of any confusion generated in the recipients' minds as to what it meant, was improper. We find there is a genuine issue of fact as to whether the report was sufficiently misleading so as to raise the issue of whether CBI's procedures for assuring "maximum possible accuracy" were reasonable.

Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40, 42 (D. C. Cir. 1984).

The Fifth Circuit explained Congress' rejection of a mere technical accuracy standard under circumstances where a consumer report stated with regard to the consumer's account, "Litigation Pending:"

> Turning to liability under § 1681e(b), any person could easily have construed the notation "Litigation Pending" as an indication that the plaintiff was being sued by Sherwin-Williams, while the actual situation was the reverse. It would have been a simple matter to prevent this ambiguity, particularly in light of Chilton's knowledge of Pinner's dispute with Sherwin-Williams.

Pinner v. Schmidt, 805 F. 2d 1258, 1262-63 (5th Cir. 1986).

Other courts agree that even "a technical truth . . . can be as misleading as an outright untruth where it paints a misleading picture." *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 977 (M.D. Fla. 1985) (entry misleadingly coded). In *Alexander v. Moore & Associates, Inc.*, 553 F. Supp. 948, 952 (D. Haw. 1982), the court posited another example illustrative of the defect in Defendant's "corrected" entry:

> [Section 1681e(b)] does not require that a consumer reporting agency follow reasonable procedures to assure simply that the consumer report be "accurate," but to assure "*maximum possible*

accuracy". Otherwise it would seem that a consumer reporting agency could report that a person was "involved" in a credit card scam, and without regard to this section fail to report that he was in fact one of the victims of the scam. This result cannot have been contemplated under the Act.

The Fourth Circuit agrees that "A report is inaccurate when it is 'patently incorrect' or when it is 'misleading in such a way and to such an extent that it can be expected to [have an adverse]' effect. *Sepulvado v. CSC Credit Servs.*, 158 F.3d 890, 895 (5th Cir. 1998)." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001) (if report could be read as stating that Dalton was found guilty of a felony, when he pled to a misdemeanour, its inaccuracy would be established). As applied to this case, if the report could be read as stating that Plaintiff had filed bankruptcy, its inaccuracy is established.

The standard for accuracy under the FCRA is not *sui generis*. This type of critical omission of a material fact also constitutes, for example, misrepresentation under common law (Restatement of Torts (Second), §§ 529, 551) and deception under the Federal Trade Commission Act of 1934. *Sterling Drug, Inc. v. FTC,* 741 F.2d 1146, 1154 (9th Cir. 1984) ("failure to disclose material information may cause an advertisement to be deceptive, even if it does not state false facts"); *Simeon Management Corp. v. FTC*, 579 F.2d 1136, 1146 (9th Cir. 1978) (deceptive to omit material fact which could affect the consumer's decision to buy); *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (trade name Dollar-A-Day has a decisive connotation which is deceptive).

The bankruptcy notation here utterly fails to meet the FCRA standard that the consumer report must be complete, accurate, and not misleading. In addition, however, the Court of Appeals has

recognized that the FCRA requires that the report must also be relevant to the subject consumer:

> The legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them, (citations omitted) and to establish credit reporting practices that utilize accurate, relevant and current information in a confidential and responsible manner.

Guimond v. Trans Union Credit Information Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (emphasis added); *Hansen v. Morgan*, 582 F.2d 1214, 1220 (9th Cir. 1978).

The purpose of the FCRA is to ensure that the needs of commerce are met "in a manner which is fair and equitable to the consumer, with regard to the . . . accuracy [and] relevancy" of information about the consumer. § 1681(b). A consumer report is one which "bear[s] on a consumer's credit worthiness, credit standing, credit capacity," and other individualized characteristics and which is to be used "as a factor in establishing the consumer's eligibility" for credit, employment, and other permissible purposes. § 1681a(d)(1). The consumer reporting agency must follow procedures to "assure maximum possible accuracy of the information concerning the individual about whom the report relates." § 1681e(b) (emphasis added). A common thread throughout the FCRA is that a consumer report relates to the individual consumer. *E.g.*, § 1681q ("information on a consumer"); § 1681r ("concerning an individual").

Someone else's bankruptcy does not bear on Plaintiff's credit worthiness or the other personal characteristics recited in § 1681a(d)(1). Just as Defendant did in this case, the FCRA presumes that a bankruptcy reported on a consumer's file belongs to that

consumer. Indeed, a separate section of the FCRA contains special rules regarding bankruptcy entries with specific reference to "a consumer report that contains information regarding <u>any case involving the consumer</u> that arises under Title 11." § 1681c(d) (emphasis added).

Including Mr. Smith's bankruptcy on Plaintiff's consumer report violates the completeness and accuracy as well as the relevancy requirements of the Act, which protects Plaintiff, whose payments remained current, from being tarnished by someone else's bankruptcy. As Congress recognized, "Inaccurate credit reports directly impair the efficiency of the banking system." § 1681(a)(1). Defendant's apparent argument that the FCRA is satisfied when a report is technically accurate, even though it is incomplete, misleading, and unrelated to the consumer, is contrary to <u>its own interest</u> in the efficiency of the banking system.

IV.

IT IS ESSENTIAL THAT DEFENDANT "SPEAK THE SAME LANGUAGE" AS THE REMAINDER OF THE CREDIT INDUSTRY

In <u>Cassara v. DAC Services, Inc.</u>, 276 F.3d 1210, 1225 (10^{th} Cir. 2002), the 10^{th} Circuit recognized the essential nature of a common industry language, standard and reporting framework prerequisite to maximizing the accuracy of information contained in a consumer's report. Here, the Defendant failed to comport with the industry standard, notwithstanding evident means to achieve it.

> But if employers in that industry are to communicate meaningfully among themselves within the framework of the FCRA, it proves essential that <u>they speak the same language</u>, and that important data be reported in categories about which there is genuine common understanding and agreement. Likewise, if DAC

> is to "insure maximum possible accuracy" in the transmittal of that data through its reports, it may be required to make sure that the criteria defining categories are made explicit and are communicated to all who participate. Id.

Here, Defendant's departure from the established industry standard was not just misleading in the abstract. Explicitly, empirically, <u>Defendant's own reporting</u> mislead it into concluding that Plaintiff had indeed filed bankruptcy (Complaint, Exhibit 1). Thus, Defendant's obdurate refusal to speak "the same language" to which the rest of the banking community subscribes, has resulted in a continued prejudice of Plaintiff's rights.

Attached respectively as Exhibits 3 and 4 are the Second Modified Stipulation of Settlement and Final Judgment in <u>Clark vs. Equifax Information Services LLC</u>. *Clark* was a class action filed in April, 2000 against Equifax, Experian and Trans Union for the precise erroneous reporting which continues to underlie Defendant's illegal practices. In 2003, the national credit reporting agencies agreed to reform their practices to insure that no reference to bankruptcy would appear on any tradeline absent either public record of a bankruptcy or language that the bankruptcy filing referenced is that of another person (Exhibit 3, pages 6-7).

A copy of the Final Judgment against Equifax is also attached (Exhibit 4). Identical judgments were entered against both Experian and Trans Union and cumulative attorney's fees of $15 million were awarded.

V.

DEFENDANT'S OWN WITNESS COULD NOT EXPLAIN WHY DEFENDANT REMOVED THE BANKRUPTCY NOTATION FROM PLAINTIFF'S CREDIT PROFILES THE MONTH AFTER PLAINTIFF'S LAWSUIT WAS FILED

This action was filed October 12, 2005. Defendant was served on October 18, 2005. The following month Defendant instructed the national credit reporting agencies to remove the bankruptcy notation from Plaintiff's credit profiles. Attached as Exhibit 5 is the condensed deposition of Defendant's own corporate designee, George Peters. Page 10 of the condensed transcript encompasses pages 34-37 of the original 57 page transcript.

Mr. Peters indeed testified that the bankruptcy was no longer being reported and that it had been removed in November, 2005. When pressed as to why it had been removed, notwithstanding the apparent contradiction, Mr. Peters responded he could not answer. Mr. Peters was also asked to supplement his testimony upon review of the transcript. No supplemental response regarding just why Defendant removed the bankruptcy notation it was "required" to report has been provided (Exhibit 5, page 10 (34-37)). Assuming Defendant has somehow correctly asserted that it was indeed required to report the bankruptcy notation on Plaintiff's credit profiles, then the removal of that notation necessarily requires a conclusion that Defendant is *currently* misreporting Plaintiff's account. Of course this is patently absurd. The foregoing simply illustrates not only Defendant's inconstancy, but also, the premise that it can't have it both ways.

VI.

CONCLUSION

Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be denied in all respects.

Respectfully submitted,

/s/

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